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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-473

DANIEL T. TAYLOR, III, - - - - Petitioner

vs.

JOHN P. HAYES, JUDGE, Jefferson Circuit Court, Criminal Branch, Second Division, - Respondent

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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IN THE

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October Term, 1973

No. _____

DANIEL T. TAYLOR, III, - - - - - *Petitioner*

v.

JOHN P. HAYES, JUDGE, Jefferson Circuit Court, Criminal Branch, Second Division, - - - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

Petitioner prays that a writ of certiorari issue to review the judgment herein of the Court of Appeals of Kentucky entered in the above entitled case on March 23, 1973, petition for rehearing denied on June 15, 1973.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals is reported at 494 S. W. 2d 737 and is printed in the Appendix, *infra*, pp. 33-49.

JURISDICTION

The judgment of the Court of Appeals of Kentucky was entered on March 23, 1973. A petition for rehearing was denied on June 15, 1973. The execution

of the mandate was stayed on June 15, 1973, for a period of 90 days to enable the petitioner to seek review of the decision in this Court. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

United States Constitution, Amendment XIV

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law. . . ."

QUESTIONS PRESENTED

1. When a trial judge summarily imposes consecutive sentences on eight counts of contempt aggregating four and one-half years' imprisonment, including sentences of one year's imprisonment on two counts, whether he or the appellate court may subsequently, in order to defeat the alleged contemnor's right to trial by jury, reduce the sentences so that the sentence on

no one count exceeds six months' imprisonment and direct that the sentences run concurrently for a total of six months' imprisonment?

2. When alleged contempts have been committed by an attorney in the presence of the trial judge and the trial judge proceeds summarily to punish for contempt, whether due process requires that the attorney be given some opportunity to be heard in defense or mitigation before he is finally adjudged guilty and sentence is imposed?

3. Whether, in the circumstances of this case, the trial judge could impartially sit in judgment on multiple contempt charges against the petitioner?

4. Whether the conduct of the petitioner that formed the basis of the contempt charges can be made punishable as criminal contempt consistent with the Sixth Amendment's guarantee of effective assistance of counsel and the Fourteenth Amendment's guarantee of due process of law?

STATEMENT OF THE CASE*

The petitioner, an attorney, seeks review of the judgment of the Court of Appeals of Kentucky, entered on March 23, 1973, affirming his conviction for criminal contempt and imposing a sentence of six months' imprisonment. The contempt conviction arose out of events occurring during the trial of Narvel and William M. Tinsley on a charge of wilful murder. The petitioner represented Narvel Tinsley, working with-

*References to the transcript of the trial of *Commonwealth* v. *Tinsley* are indicated by the prefix "Tr."

out pay. The trial was held before the respondent (hereinafter referred to as the trial judge) in the Criminal Branch, Second Division, Jefferson Circuit Court, Louisville, Kentucky, from October 18, 1971, through October 29, 1971.

The defendants, young black men, were accused of killing two white police officers. The trial attracted a great deal of press and public attention, and was hotly contested. At various times during the trial the trial judge informed the petitioner that he was in contempt. He did not, however, specify what the charges were, nor give the petitioner any meaningful opportunity to respond to the charges. After the first count had subsequently been changed to a warning, there were eight counts of contempt. On counts 2 through 5 the trial judge did permit some discussion about what had led up to the citation, but it soon drifted into a discussion of the substantive issues. On counts 6 and 9 the trial judge simply informed the petitioner that he was in contempt (Tr. 2016, 2172). He permitted the petitioner to make a response for the record on count 7, but then directed the court reporter not to put the response in the record (Tr. 2032). He specifically refused to allow the petitioner to make a response for the record on count 8 (Tr. 2069). At no time during the trial did he impose punishment on any of the counts.

At the conclusion of the trial, after the jury had returned its verdict, finding both defendants guilty and sentencing them to death, but while the jury was still in the box, the following colloquy occurred:

"The Court: Mr. Taylor, the Court has something to take up with you, sir, at this time.

Mr. Taylor: Well, I'll be right here, Judge.

The Court: I've for two weeks sit here and listen to you. Now, you're going to listen to me. Stand right here, sir.

For two weeks I've seen you put on the worst display I've ever seen an attorney in my two years of this court and 15 years of practicing law.* You've quoted that you couldn't do it any other way. You know our court system is completely based upon, particularly criminal law, the Doctrine of Reasonable Doubt. That's exactly what it means, reason. It doesn't mean that it's based upon deceit; it doesn't mean that it's based upon trickery; it doesn't mean it's based upon planned confusion.

Sometimes I wonder really what your motive is, if you're really interested in the justice of your client, or if you have some ulterior motive, if you're interested in Dan Taylor or Narvel Tinsley.

It's a shame that this court has to do something that the Bar Association of this State should have done a long time ago.

As far as a lawyer is concerned, you're not. I want the jury to hear this; I want the law students of this community to hear this, that you're not the rule, you're the exception to the rule.—

Mr. Taylor: (Interrupting) Thank you.

The Court: I want them to understand that your actions should not be their actions because this is not the way that a court is conducted. This

*Of interest is the fact that the bulk of this fifteen years was spent either as a Special Agent for F.B.I., or as an Assistant Commonwealth's Attorney (Prosecutor) in Louisville.

is not the way an officer of a court should conduct itself.

Mr. Taylor: I would respond to you, sir—

The Court: (Interrupting) You're not responding to me on anything.

Mr. Taylor: (Interrupting) Oh yes, I will.

The Court: Yes, you're not, either.

Mr. Taylor: Yes, I will.

The Court: The sentence is on Count One—

Mr. Taylor: (Interrupting) Unless you intend to gag me—

The Court: (Interrupting) I'll do that—

Mr. Taylor: (Interposing) My lawyers will respond to you—

The Court: (Interposing) I'll do that, sir.

Mr. Taylor: My lawyers will respond to you, sir.

The Court: You be quiet, or you'll—there will be some more contempts—

Mr. Taylor: (Interrupting) No, you heard what I said.

The Court: I have you on nine counts. First Count, 30 days in jail; Second Count, 60 days in jail, Third Count, 90 days in jail; Fourth Count, six months in jail; Fifth Count, six months in jail; Sixth Count, six months in jail; Seventh Count, six months in jail; Eighth Count, one year in jail; Ninth Count, one year in jail, all to run consecutive.

Take him away.

Mr. Taylor: We will answer you in court.

The Court: I'd be glad to see you" (Appendix, infra, pp. 58-59).

At the conclusion of this colloquy, the petitioner was placed in the custody of peace officers and taken to the Louisville City Jail. The trial judge refused to make

himself available to petitioner's counsel for the purpose of setting bail, and a bail hearing had to be ordered by the Court of Appeals of Kentucky. The trial judge refused to allow the petitioner to be present at the hearing, and also denied bail. Bail was finally ordered by the Kentucky Court of Appeals, and the petitioner filled same, and was released. On November 4, 1971, the trial judge entered an order prohibiting the petitioner from "further practice of law in this Court."

After the petitioner had filed his appeal in the Court of Appeals of Kentucky, the trial judge, weeks later, moved the Court of Appeals for permission to correct the judgment, and his motion was granted over the objection of the petitioner. In the corrected judgment the trial judge stated that the first count of contempt should be changed to a warning, and he reduced the sentence of one year's imprisonment imposed on count 8 and on count 9 to a sentence of six months' imprisonment on each count. He then set forth the sentences on each of the remaining counts, six of which were punished by six months in jail, one of which was punished by 60 days in jail and one of which was punished by 90 days in jail. He did not specifically state that the sentences were to run consecutively, as he did when imposing sentence from the bench, but he also did not state that they were to run concurrently[1] (Appendix, *infra*, pp. 53-57).

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[1]Under Kentucky Rules of Criminal Procedure 11.04(1), the trial judge must specify in the judgment whether two or more sentences are to be served concurrently or consecutively, and if the

(Footnote continued on following page.)

In his appeal to the Court of Appeals the petitioner raised all of the issues presented in this Petition, and some others, as well. Specifically, he contended that under the Sixth Amendment he was entitled to a trial before a jury on the contempt charges, that his due process rights were violated because he was not given a full and fair opportunity to be heard in defense or mitigation and because the trial judge could not impartially sit in judgment on the charges, and that the conduct that formed the basis of the charges against him could not be made punishable as criminal contempt consistent with due process of law and with the Sixth Amendment's guarantee of the effective assistance of counsel. He also raised various state law questions. The Court of Appeals held that the order prohibiting the petitioner from the practice of law in the Second Division (i.e. the Court of Respondent) was improper under state law and set it aside. With respect to the petititoner's contention that he was entitled to a jury trial on the contempt charges, the Court held that the sentences should now be served concurrently rather than consecutively, and that since the total sentence would not then exceed six months, the petitioner was not entitled to a jury trial. In all other respects it affirmed the conviction and rejected the petitioner's Constitutional contentions. Petitioner's Petition for Rehearing to the Court of Appeals was denied on June 15, 1973, without comment.

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judgment does not provide otherwise, sentences are construed to run consecutively. *Beasley* v. *Wingo, Ky.*, 432 S. W. 2d 413 (1968). Under Kentucky law the question of whether sentences should run consecutively is within the exclusive discretion of the trial judge. *McBride* v. *Commonwealth*, Ky., 432 S. W. 2d 410 (1968).

REASONS FOR GRANTING THE WRIT

I.

This Court should grant certiorari to determine the substantial question of whether an alleged contemnor's right to trial by jury on multiple contempt charges can be defeated by the subsequent actions of the trial judge or the reviewing court in reducing or modifying the sentence so that the total sentence imposed does not exceed six months' imprisonment, thereby converting the offense into a "petty offense," within the meaning of the trial by jury guarantee.

When the trial judge ordered the peace officers to "take him away," the petitioner faced a sentence of 54 months' imprisonment, including one year on each of two counts. As the trial judge subsequently realized, he could not, without the intervention of a jury, impose a sentence of one year's imprisonment on those counts, *Baldwin* v. *New York*, 399 U. S. 66 (1970), and as he specifically stated, in order that the petitioner's Sixth Amendment right to trial by jury not come into play, he reduced the sentences on those counts to six months' each. Assuming that the sentences were to run consecutively, the petitioner then faced 41 months' imprisonment, and he argued on his appeal that such a sentence could not be imposed without the intervention of a jury.

The trial judge attempted to meet this argument in his brief by arguing that so long as the sentence on no one count exceeded six months (which he accomplished by reducing the sentences on counts 8 and 9) there was no right to trial by jury, irrespective of the aggregate amount of the sentence. This view was rejected in

United States v. *Seale,* 461 F. 2d 345 (7th Cir. 1972), where as here, sentence was not imposed until after the trial, and the Kentucky Court of Appeals has not only indicated agreement with the approach in *Seale,* but has specifically held that there cannot be incarceration for more than six months for contempt of court "except upon the unanimous verdict of a jury under instructions including the reasonable doubt protection, as in comparable criminal cases." *Local No. 1667, United Auto Workers* v. *Kawneer Company, Inc.,* Ky., 490 S. W. 2d 747 (1973). In order to bring the petitioner's case within the "six month rule," the Court of Appeals, absolutely gratuitously, directed that the sentences be served concurrently rather than consecutively,[2] and then held that the petitioner was not entitled to a jury trial on the charges.

This Court should grant certiorari to make it clear what criteria apply in determining whether a particular contempt proceeding constitutes a "petty" or "serious" offense within the meaning of the trial by jury

[2]In so doing the Court disregarded either its prior holding to the effect that if the judgment does not provide otherwise, multiple sentences are construed to run consecutively, *Beasley* v. *Wingo,* Ky., 432 S. W. 2d 413 (1968), or its prior holding to the effect that whether sentences are to run consecutively or concurrently is within the exclusive discretion of the trial judge. *McBride* v. *Commonwealth,* Ky., 432 S. W. 2d 410 (1968). It is also interesting to note that while the trial judge originally argued that he had the power to impose sentences aggregating 41 months' imprisonment so long as the sentence on no one count exceeded six months (Brief for Respondent-Appellee, pp. 2, 17), in response to the petitioner's Petition for Rehearing, he argued that he had intended to limit the total sentence to six months in the corrected judgment. (Response to Petition for Rehearing, p. 1). What has occurred here is quite obvious—the sentences were ordered to run concurrently so as to defeat the petitioner's claim to a jury trial.

guarantee, and whether the right to trial by jury can be defeated by the *subsequent* actions of the trial judge or reviewing court in modifying the total sentence to a maximum of six months' imprisonment. This Court has stated that in determining whether a particular offense is "petty," it has sought "objective indications of the seriousness with which society regards the offense." *Frank* v. *United States,* 395 U. S. 147, 148 (1969). But there are problems in applying this test to criminal contempt because of the great range of conduct that may be considered "contemptuous" and because of the general absence of maximum penalties for the offense. For this reason, this Court has held that in prosecutions for criminal contempt where no maximum penalty is authorized, "The severity of the penalty actually imposed is the best indication of the seriousness of the particular offense," *Frank* v. *United States, supra,* 395 U. S. at 149, and in light of *Baldwin* v. *New York, supra,* where the penalty actually imposed exceeds six months' imprisonment, there is the right to a jury trial. But it has not held that the severity of the penalty actually imposed is the *only* indication of the seriousness of the offense.

The Kentucky legislature has clearly indicated its view that contempt should be regarded as a serious offense in that State by limiting the punishment that can be imposed for contempt without the intervention of a jury to a maximum fine of $30 and imprisonment for 30 hours. Kentucky Revised Statutes 436.020. In the case at bar the petitioner relied on this statute to contend that he was entitled to a jury trial under state

law as well as under the Sixth Amendment. The Court of Appeals, however, held that the statute was invalid under the State Constitution, and that the power of the trial judge to impose punishment for contempt was unlimited. 494 S. W. 2d at 745. See also *Arnett* v. *Meade,* Ky., 462 S. W. 2d 940 (1971).

The legislative determination that contempt is a serious offense, albeit that it is one contained in a statute declared invalid under state law, certainly is an "objective indication" of the seriousness with which the offense is regarded in Kentucky. More importantly, the allegedly contemptuous conduct with which the petitioner was charged was deemed serious enough by the trial judge so that he originally imposed a one year prison term on each of two counts and imposed consecutive sentences on all of the counts aggregating 54 months' imprisonment. The seriousness with which he viewed the purported offense is further evidenced by his extreme statements from the bench at the time he sentenced the petitioner, his refusal to admit the petitioner to bail pending appeal or even to hold a bail hearing, and his entry of an invalid order prohibiting the petitioner from practicing in the Second Division. The Court of Appeals, while holding that the petitioner had only been convicted of a "petty" offense within the meaning of the trial by jury guarantee, said of the allegedly contemptuous conduct that it was "such as to place on trial the entire judicial system of the Commonwealth and those judges sworn to uphold its Constitution and laws and thereby assure defendants a fair, orderly and speedy trial." 494 S. W. 2d

at 741. The petitioner, of course, would most vigorously dispute this characterization of his conduct, and contend that he did nothing more than zealously defend the rights of his client charged with a capital offense, but the fact that his conduct was so characterized by the Court of Appeals, coupled with the severity of the sentence originally imposed, certainly supplies the "objective criteria reflecting the seriousness of the offense," *Frank* v. *United States, supra,* within the meaning of the trial by jury guarantee.

What has happened here is that the Court of Appeals has read this Court's decisions in *Frank* v. *United States* and *Baldwin* v. *New York, supra,* as setting forth a "six month rule" and holding that whenever the sentence actually imposed is less than six months, *regardless of other "objective criteria reflecting the seriousness of the offense",* there is no right to a jury trial. This Court did not so hold in those cases, and certiorari should be granted to determine whether "objective criteria reflecting the seriousness of the offense" can be disregarded where the sentence actually imposed is less than six months. Certiorari should also be granted to determine whether the right to trial by jury can be defeated by the subsequent modification of the sentence on the part of the trial judge or reviewing court to bring it within the purported "six month rule."[3] Here the allegedly contemptuous conduct was deemed seri-

[3]Compare *Mitchell* v. *Fiore,* 470 F. 2d 1149 (3rd Cir. 1972), where the trial judge viewed the contempt as "petty" and imposed a $10,000 fine for "civil contempt." The appellate court held that the imposition of the fine was punitive, so that the contemnor would have been entitled to a jury trial if it had been allowed to stand, but instead vacated the fine.

ous enough by the trial judge to warrant the imposition of sentences of one year's imprisonment on each of two counts and consecutive sentences aggregating 54 month's imprisonment. He reduced the one year sentences to six month's each for the express purpose of defeating the petitioner's right to a jury trial, and the Court of Appeals ruled that the sentences had to run concurrently, again for the purpose of denying the petitioner trial before a jury on the charges. Certiorari should be granted to determine whether the Sixth Amendment's trial by jury guarantee can be dealt with in so cavalier a manner.

This case presents substantial questions as to the criteria for determining what constitutes "serious" contempt within the meaning of the trial by jury guarantee, and as to whether the Sixth Amendment's protection can be lost by subsequent modification of the sentence originally imposed to bring it within a purported "six month rule." Certiorari should be granted by this Court to resolve these questions.

II.

This Court should grant certiorari to determine the substantial question of whether due process requires that when a trial judge proceeds summarily to punish for alleged contempts committed in his presence, the contemnor must be given some oportunity to be heard in defense or mitigation before he is finally adjudged guilty and sentence is imposed.

This Court has not, because it has not been presented with the precise question, specifically held whether due process requires that when a trial judge proceeds summarily to punish for alleged contempts committed in his presence, the contemnor must be given some opportunity to be heard in defense or mitigation before he is finally adjudged guilty and sentence is imposed. The same question may exist in a non-Constitutional context with respect to summary punishment of contempts under Federal Rules of Criminal Procedure 42(a), since it is not specifically provided in the rules that the alleged contemnor is entitled to be heard. See *United States* v. *Galante,* 298 F. 2d 72 (2d Cir. 1962); C. Wright, *Federal Practice and Procedure* § 708 (1969).

The likely reason that this precise question has not been presented heretofore is that in most instances it may be expected that the judge will give the person charged some opportunity to be heard in defense or mitigation. As this Court stated in *Groppi* v. *Leslie,* 404 U. S. 496, 504 (1972):

> "Where a courts acts immediately to punish for contemptuous conduct committed under its eye,

> the contemnor is present, of course. There is then no question of identity, nor is a hearing in a formal sense necessary because the judge has personally seen the offense and is acting on the basis of his own observations. *Moreover, in such a situation, the contemnor has normally been given an opportunity to speak in his own behalf in the nature of a right of allocution.*" (Emphasis added.)

In *Sacher* v. *United States*, 343 U. S. 1 (1952), perhaps the most "extreme" holding with respect to a court's power to punish summarily for contempt, the contemnors were given an opportunity to speak in their defense, and as this Court noted, "Although he imposed sentence before hearing the contemnors, the trial judge would, no doubt have modified his action had their statements been persuasive." *Groppi* v. *Leslie, supra*, 404 U. S. at 506, n. 11. See also *Levine* v. *United States*, 362 U. S. 610, 613-614 (1960); *Brown* v. *United States*, 359 U. S. 41, 52 (1959). Because the opportunity to speak in the nature of a right of allocution is generally given and because the exercise of the summary contempt power has been strictly limited, see *e.g., Johnson* v. *Mississippi*, 403 U. S. 212 (1971), it has not heretofore been necessary for this Court to consider the precise question of whether some opportunity to be heard in defense or mitigation in summary contempt proceedings is required by due process of law. In the Kentucky Court of Appeals the petitioner proceeded on the assumption that this was required, since reasonable notice of a charge and the opportunity to be heard in defense before punishment is imposed are "basic in

our system of jurisprudence." *In re Oliver*, 333 U. S. 257, 273 (1948). However, the Court of Appeals refused to accept this assumption, and rejected the petitioner's argument that his due process rights had been violated in this respect. It merely noted that the petitioner was informed by the trial judge that he was in contempt immediately following the charged act so that, "The contempt citations and the sentences coming at the end of the trial were not and could not have been a surprise," 494 S. W. 2d at 741-2. The imposition of a contempt sentence without offering the contemnor the opportunity to be heard in *United States* v. *Galante, supra,* and the language in some state court decisions indicating that there is no right to be heard in case of summary contempt, see *e.g., People* v. *Carr,* 3 Ill. App. 3d 227, 278 N. E. 2d 839, 840 (1971), lend further impetus to the petitioner's position that it is necessary for this Court to precisely hold that there must be some opportunity to be heard in defense or mitigation before punishment for criminal contempt may be summarily imposed.

At no time was the petitioner informed of the charges against him or given any meaningful opportunity to be heard in defense or mitigation. At various times during the trial the trial judge told the petitioner that he was in contempt, but he did not specify what the charge was nor impose any punishment at the time. On counts 2 through 5 he did permit some discussion about the allegedly contemptuous conduct, but it was intertwined with a discussion of the substantive issues. On counts 6 and 9 the trial judge simply informed the

petitioner at the bench that he was in contempt. He allowed the petitioner to make a response for the record on count 7, but then directed the court reporter not to put it in the record, and specifically refused to permit the petitioner to make a response for the record on count 8. At the end of the trial he summoned the petitioner before the bench, attacked his integrity and professional qualifications, and without giving him any opportunity to speak a word in his defense, reeled off sentences on nine counts of contempt (later changed to eight), aggregating 54 months' imprisonment. When the petitioner pleaded with the trial judge for the opportunity to speak, the trial judge threatened to gag him, and after imposing sentence, directed to bailiff to "take him away." It should also be emphasized that the trial judge never specified what the charges were until some *five months later* when the petitioner had appealed his case and the trial judge obtained permission to file a "corrected judgment."

It is precisely because the power to punish summarily for contempt can be exercised in the way it was here, and still be sustained by the highest court of a state, that it is necessary for this Court to make it clear that some rudimentary form of due process applies to summary contempt proceedings. There is no contention that the opportunity to be heard in response to a charge of direct contempt committed in the court's presence is the same as the full-scale hearing required when the alleged contempt is committed outside of the Court's presence. *C.f. Johnson* v. *Mississippi, supra;* Federal Rules of Criminal Procedure 42(b). What is

contended is that the power to punish summarily for allegedly contemptuous conduct committed in the presence of the court does not include the power to deny the contemnor any meaningful opportunity to be heard at all in defense or mitigation. The contemnor, it is submitted, is entitled to be informed of the precise charge of contempt that is being made against him, and to present his defense to the charge and matters in mitigation. He is also entitled to a ruling on the charge and to be informed of the punishment. If a person charged with a minor offense were treated in the manner that the petitioner was treated here, there would be no doubt but that there had been a flagrant denial of due process of law. An attorney, who may suffer adverse professional consequences as well as imprisonment from a finding of contempt, surely should be entitled to the same due process, and all semblance of due process should not be disregarded merely because the trial judge is acting summarily.

This Court should grant certiorari to make it clear whether or not some rudimentary form of due process is required when a trial judge acts summarily to punish for contempt.

III.

The holding of the Court below that the trial judge could impartially sit in judgment on the multiple contempt charges against the petitioner is clearly inconsistent with the decisions of this Court on the question of judicial disqualification in contempt proceedings.

Although the trial judge cited the petitioner for contempt at various times during the trial, he did not act to impose punishment until after the trial had been completed. Thus, there was no question as to the necessity of "instant punishment," and as the Court of Appeals recognized, if the trial judge could not impartially sit in judgment on the contempt charges, the petitioner's conviction would have had to have been reversed. *Mayberry* v. *Pennsylvania,* 400 U. S. 455 (1971). However, the Court of Appeals held that the trial judge was not disqualified, and that holding, it is submitted, is patently inconsistent with the decisions of this Court on the question of judicial disqualification in contempt proceedings.

It is well-settled that the trial judge is disqualified to sit in contempt proceedings where he has become personally *embroiled* in controversy with the alleged contemnor, such as where he is an "activist" seeking combat, *Offutt* v. *United States,* 348 U. S. 11 (1954), where he has been the victim of a "personal attack," *Mayberry* v. *Pennsylvania, supra,* where for any reason he may be biased against the alleged contemnor, *Johnson* v. *Mississippi,* 403 U. S. 212 (1971), or where he has adopted an adversary posture with respect to the alleged contemnor. *United States* v. *Meyer,* 462

F. 2d 827 (D.C. Cir. 1972). In the circumstances of this case, for the Kentucky Court of Appeals to hold that the trial judge was not disqualified from sitting in judgment on the contempt charges against the petitioner evidences a complete disregard of well-settled principles of law that have been established by this Court.

The animus and hostility of the trial judge toward the petitioner is amply demonstrated by his conduct and statements throughout the trial and thereafter. To say the least, the interchanges between court and counsel during the trial "were marked by expressions and revealed an attitude which hardly reflected the restraints of conventional judicial demeanor." *Offutt* v. *United States, supra,* 348 U. S. at 12. From the beginning the trial judge cast aspersions on the petitioner's character and ability, and accused him of improper motives. While the voir dire was going on, the trial judge stated that he was going to take it over and said to the petitioner, "I think you're putting on a show. That's my opinion" (Tr. 348). During a discussion in chambers about wrangling between attorneys, he stated in reference to the petitioner: ". . . you all were talking and I can't blame the guy too much for that, but on the other hand, he is getting away from the questions and knowing him, if you give him an inch, he'll take a mile. I might as well sit on him right now" (Tr. 546). In another interchange the trial judge again insisted on indulging in personalities:

"Mr. Taylor: Does Your Honor understand that my purpose is to defend my case?

The Court: I think that's probably what you're here for, I'm not sure" (Tr. 1364).

And in still another interchange when the petitioner attempted to explain his basis for making an objection:

"Mr. Taylor: The objection is that he uses the word 'also' as inferring that he's got these great confessions.

The Court: Don't go through all those configurations and put on an act" (Tr. 1860).

The trial judge also accused the petitioner of "trying to make every case a political trial," and in a totally unprecedented move, directed that the petitioner prepare a list of every witness he planned to call within fifteen minutes and summarily ruled on whether those witneesses would be permitted to testify (Tr. 1908-1910).

The effect of the trial judge's hostility toward the petitioner on his imposition of the sentences for contempt is graphically illustrated by the following interchange:

"Mr. Taylor. Thank you. Now, may I say, additionally, I have serious doubts as to the legal correctness of the order and since we have, I have, I don't know, five months of my life wrapped up in this case, and maybe more than that—

The Court: (interrupting) Before it's over, you might have a lot more than that.

Mr. Taylor: Would the Court care to amplify on the meaning of that?

The Court: The Court just made a statement.

Mr. Taylor: Sir, I didn't—

The Court: (interrupting) The Court just made a statement.

Mr. Taylor: Yes, sir, and I asked if the Court would care to expand on the meaning of—

* * * * * * *

The Court: (interrupting) I don't have to explain my comments.

Mr. Taylor: I see. I'm requesting that you reconsider and that you adjourn until tomorrow and give me an opportunity to get before our reviewing Court for a Writ of Mandamus—

The Court: (interrupting) Overruled.

Mr. Taylor: I wonder if I might finish my sentence before you overrule—

The Court: (interrupting) It's overruled" (Tr. 1957-8).

It cannot be doubted that in the case at bar the contempts charged were "entangled with the judge's personal feeling against the lawyer." *Offutt* v. *United States, supra,* 348 U. S. at 14. Marked personal feelings were present, at least on the part of the trial judge, and as the above examples indicate, he clearly was an "activist seeking combat." (In its Opinion, the Kentucky Court of Appeals characterized petitioner's conduct as being "polite.")

Moreover, while it is indeed true, as the Court of Appeals found, that the petitioner did not launch a personal attack against the trial judge, the fact remains that the trial judge perceived himself as the victim of such an attack. This appears most clearly

in the contempt citations themselves and in his "introductory remarks." The Court of Appeals was also incorrect in saying that the petitioner did not attack the trial judge's "integrity or ability." Quite to the contrary, in attempting to defend his client to the best of his ability, it was painfully necessary for the petitioner to accuse the trial judge of denying his client's right to a public trial (Tr. 1895), and of acting on the basis of rancor in ruling that race was not an issue in the case (Tr. 1968). He also sought a delay in the case so that he could seek a writ of mandamus from the Court of Appeals to prevent the trial judge from proceeding further in the case (Tr. 1957). Clearly, the petitioner charged that the trial judge was acting unfairly, which is certainly an attack, albeit a necessary one, on his "integrity or ability." A trial judge may be disqualified to proceed against an alleged contemnor when his integrity or ability has been called into question, such as where a party or attorney has charged the judge with bias or unfairness, *Holt* v. *Virginia,* 381 U. S. 131 (1965); *United States* v. *Meyer, supra; In re Dellinger,* 461 F. 2d 389 (7th Cir. 1972). That charge was made here, and in such circumstances, the case of *Ungar* v. *Sarafite,* 376 U. S. 575 (1964), relied on by the Court of Appeals to hold that the trial judge was not disqualified from sitting in judgment on contempt charges against the petitioner, is clearly inapplicable. See the discussion in *United States* v. *Meyer, supra,* 462 F. 2d at 845.

Finally, the trial judge is disqualified from sitting in judgment on contempt charges, where he has

"adopted an adversary posture with respect to the alleged contemnor." *United States* v. *Meyer, supra,* 462 F. 2d at 862. Whatever else may be said about this case, it cannot be denied that the trial judge adopted an adversary posture with respect to the petitioner. In the view of the Court of Appeals, the trial judge "appeared to be continuously on the defensive in his effort to contain Taylor to the point where the defendants would be assured a fair trial." 494 S. W. 2d at 742. While the petitioner would dispute this characterization of what the trial judge was doing, it is clear that he and the trial judge were perceived by the Court of Appeals as being in an adversary posture, and this being so, the trial judge was certainly disqualified from sitting in judgment on the contempt charges against him.

If "actions speak louder than words," the bias of the trial judge toward the petitioner, and his obvious lack of impartiality, is manifestly demonstrated by his unprecedented order that the petitioner produce a list of all the defense witnesses within fifteen minutes, and his summarily deciding in advance that many of them would not be permitted to testify. Consider the following:

> "The Court: What's Hyde got to do with this?
> Mr. Taylor: Quite a bit.
> The Court: He just was at that time Chief of Police?
> Mr. Taylor: He was in charge of the whole thing.
> The Court: Strike him" (Tr. 1989).

Further:

> "The Court: I am not going to hold up these proceedings waiting for a witness. If he's here, he can testify, if he isn't, *we'll skip over him*" (Tr. 2036-2037). (Emphasis added.)

The Court's bias is further manifested by his invalid order prohibiting the petitioner from the further practice of law in the Second Division of Jefferson Circuit Court. It is still further manifested by his refusal to admit the petitioner to bail, or to even hold a bail hearing (at which the petitioner was not permitted to be present) until ordered to do so by the Court of Appeals.

But above all else there is the behavior of the trial judge at the conclusion of the trial when he finally adjudged the petitioner guilty of the contempts charged and imposed consecutive sentences aggregating four and one-half years' imprisonment. The trial judge not only accused the petitioner of improper motives, not only criticized the bar association for not having disciplined the petitioner "years ago," not only said that he wanted the members of the jury and the law students "of the community" to hear his remarks, but refused to allow the petitioner to speak a word in his defense, threatened to gag him if he persisted in trying to do so, and directed the bailiff to "take him away." The utter absence of any semblance of impartiality is reflected in the statement he made when he began to impose sentence, "I *have* you on nine counts." (Emphasis added.) The Court of Appeals referred to the

trial judge's remarks as "inappropriate," and conceded that they were "somewhat similar to the statements made in *Offutt.*" 494 S. W. 2d at 744. But then went on to say that they did not clearly demonstrate bias. If those remarks and the judge's behavior at the time he was sentencing the petitioner to four and one-half years' imprisonment do not demontrate bias, it may be asked what does. The Court went on to say that "in light of the obvious guilt of Taylor these remarks were not such a showing of bias as to require the disqualification of the judge." 494 S. W. 2d at 745. It is difficult to see what the supposed "obvious guilt" of the petitioner has to do with the bias of the judge. If the judge has demonstrated his bias, as he clearly did here, he is not capable of maintaining "that calm detachment necessary for fair adjudication," as required by *Mayberry* v. *Pennsylvania, supra,* 400 U. S. at 465. A clearer case of guilt than was present in *Mayberry* cannot be imagined, 400 U. S. at 462-463, but the guilt of the contemnor had nothing to do with the ability of the judge to impartially determine guilt, and, more importantly, to impose sentence.

Trial before an unbiased judge is essential to due process of law, *Bloom* v. *Illinois,* 391 U. S. 194, 205 (1968) and the statements and behavior of the trial judge in the case at bar demonstrate beyond peradventure the bias and hostility that he bore toward the petitioner. For the Court of Appeals to hold that in the circumstances of this case the trial judge was not disqualified from sitting in judgment on the contempt charges against the petitioner is to disregard

completely the applicable principles of law established by this Court. The flagrant denial of due process that has thus been sanctioned calls for the granting of certiorari by this Court and the reversal of the petitioner's conviction.

IV.

This Court should grant certiorari to determine the substantial question of what conduct on the part of an attorney engaged in zealous representation of his client can be made punishable as criminal contempt on the ground that it has created a material obstruction to the administration of justice.

This Court has held that an attorney is entitled to much latitude in vigorously conducting a client's cause, and that a lawyer cannot be convicted for contempt of court unless he "in some way creates an obstruction which blocks the trial judge in the performance of his judicial duty." *In re McConnell,* 370 U. S. 230, 236 (1962). It has also held that mere "disrepect" toward the person of the trial judge cannot constitute criminal contempt. *In re Little,* 404 U. S. 553 (1972). The protection afforded an attorney in this respect must be related to the Sixth Amendment's guarantee of the effective assistance of counsel, and is as much for the benefit of the client as for the attorney. It has been said that in the defense of his client an attorney has the right to be "persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious when acting on his client's behalf." *In re Dellinger,* 461 F. 2d 389, 400 (7th Cir. 1972). But an attorney

who conducts a vigorous defense in this manner may well be perceived as "contemptous" by trial judges who are insecure in their authority, who are not "men of fortitude, able to thrive in a hardy climate," *Craig* v. *Harney,* 331 U. S. 367, 376 (1948), and who are unable to avoid confusing "offenses to their sensibilities with obstruction to the administration of justice." *Brown* v. *United States,* 356 U. S. 148, 153 (1958). In order for the Sixth Amendment's guarantee of the effective assistance of counsel to be truly meaningful, this Court must make clear precisely what conduct on the part of an attorney engaged in the zealous representation of his client can rise to the level of a "material obstruction to the administration of justice" and subject him to punishment for criminal contempt.

The case at bar is a particularly appropriate one for this Court to grant review and consider this question. Most of the charges against the petitioner involve an alleged lack of "respect" shown to the court, and as can be seen from the specification of the charges themselves, they raise most strikingly the issue of when a trial judge has "confused offenses to his sensibilities with obstruction to the administration of justice." *Brown* v. *United States, supra.* The Court of Appeals likewise was obsessed with the notion of "respect," and in its opinion stated that even the brief that was filed on behalf of the petitioner "in itself demonstrates something less than complete and total respect for the judicial system of this Commonwealth." 494 S. W. 2d at 741. The Court's obsession with "respect" caused it to ignore completely the crucial question of "ma-

terial obstruction to the administration of justice," *In re McConnell, supra,* and it appears to be holding that mere "disrespect" toward the person of the trial judge can constitute criminal contempt, in clear disregard of this Court's decision in *In re Little, supra.* The other charges against the petitioner essentially involved a conflict between the petitioner and the trial judge over whether certain matters were admissible into evidence and the petitioner's efforts to redirect a line of questioning so as to make the evidence sought to be elicited admissible. There was no showing of persistent disregard of the court's rulings, of insistence on obedience by the court and defiance by the petitioner, or of any conduct that "in some way creates an obstruction which blocks the trial judge in the performance of his judicial duty." *In re McConnell, supra.*

The Kentucky Court of Appeals just totally refused to discuss the specific charges of contempt leveled against the petitioner, or to demonstrate why the conduct alleged in those charges constituted an "obstruction to the administration of justice." Its Opinion demonstrated a total hiatus in this regard. Instead it engaged in completely unwarranted assumptions concerning the motivations of the petitioner, and accused him of having a "plan" to disrupt the trial. But at no point did it refer to any evidence in the record that would support its assumptions concerning the petitioner's motivation or his purported "plan."* The

*It belies common sense that Petitioner, serving without pay in a vastly unpopular case, which had already drug on for two weeks before a Judge of this type, would want to repeat the process, in future, for any reason whatsoever.

Kentucky Court of Appeals has clearly acted improperly, and has ignored Constitutional criteria, in upholding the conviction of the petitioner.

It is respectfully submitted that if the conduct for which the petitioner has been convicted can Constitutionally be made punishable as criminal contempt, the power of a trial judge to inhibit an attorney in the vigorous representation of his client by the threat of contempt citations will be virtually unlimited. This will then effect the total emasculation of the criminal defense Bar, and mean an end to zealous advocacy in the United States. This case presents the Court with the opportunity to define precisely what conduct on the part of an attorney engaged in the zealous representation of his client can be made punishable as criminal contempt, consistent with the Sixth Amendment's guarantee of the effective assistance of counsel and the Fourteenth Amendment's guarantee of due process of law, and for this reason certiorari should be granted.

CONCLUSION

For the reasons set forth herein, a writ of certiorari should be granted to review the judgment of the Court of Appeals of Kentucky.

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